84-713

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Are DOL and federal contracting agencies and courts empowered, in effect, to repeal the 1972 amendments to the Service Contract Act, 41 U.S.C. § 351, *et seq.*, by excusing *ultra vires* failure to issue wage determinations until there has been a judicial declaration of coverage, and then refusing to grant retroactive relief from the date of the successorship?

2. Are the predecessor's wage and fringe benefits, established by 41 U.S.C. § 353(c) as the successor's minimum wage and fringe benefits, written into (a) the successor's service contracts and (b) its collective barbaining contracts, by operation of federal law, superseding the lower rates and fringe benefits agreed to by the parties?

3. Is the "direct," independent, "self-executing," duty of successor employers under § 353(c) judicially enforceable by its beneficiaries under 28 U.S.C. § 1331 and/or 29 U.S.C. § 185?

4. Are the mandatory duties of NASA and DOL enforceable by mandamus under 5 U.S.C. § 706(1), 28 U.S.C. §§ 1331 and 1361?

5. Did the courts below err in refusing to pass upon the validity of § 4.133(b), DOL Rules and Regulations, and DOL's restrictive interpretation of § 353(c) as limited to predecessors with collective bargaining contracts?

PARTIES INVOLVED

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

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Petitioner District Lodge No. 166, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter sometimes referred to as IAM or the Union, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. 1a-14a)* is reported at 731 F.2d 711 (1984). The opinions and judgments of the District Court, dated November 17, 1981, and September 24, 1982, respectively (18a-39a), are not officially reported.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered May 3, 1984. A petition for rehearing and suggestion for rehearing *en banc* was denied on July 5, 1984

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* The Appendix is separately bound and paginated "a".

(16a-17a). On September 21, 1984, Justice Powell extended the time for filing a petition for certiorari to November 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTORY PROVISIONS

The statutory provisions, Department of Labor Regulations, and the legislative history of the 1972 Service Contract Act (SCA) amendments appear in the Appendix.

STATEMENT OF THE CASE

A. The 1972 Amendments to SCA

In response to bi-partisan outrage that federal contracting agencies and the Department of Labor (DOL) were deliberately frustrating and gutting SCA, 41 U.S.C. § 351-358, by misconstruction and non-enforcement (165a-166a, 172a, 176a, 180a, 181a, 62a-63a, 77a, 89a, 91a, 92a, 99a, 107a, 108a-109a, 116a, 117a),[1] in 1972 Congress divested the Secretary of any discretion to exempt *any* covered contracts from the wage determination provisions of the Act (SCA, 4(b), 41 U.S.C. § 353(b) (parenthetical exception of § 10)[2] (34a) and made it mandatory (71a, 74a-75a) for federal contracting agencies to apply for (29 C.F.R. § 4.4) and for the Secretary of Labor to issue, pre-contract wage determinations for all

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[1] "The subcommittee found that the Act is being so interpreted and so administered as to substantially thwart the intent of Congress in enacting it." (29a). The Oversight Committee attributed denial of "the protections of the SCA to * * * nonfeasance on the part of the Department of Labor." (180a).

Congressman O'Hara, the sponsor said "* * * the Labor Department—* * * *seemed to overlook no opportunity to render the act nugatory.*" (108a-109a, emphasis added.)

[2] The USCA note on this amendment reads (41 U.S.C.A. § 353(b), "1972 Amendment," Cumulative Annual Pocket Part, for use in 1984, p. 176):

> Subsec. (b). Pub. L. 92-473, § 3(a), *excluded section 358 of this title from being subject to Secretary's authority to provide limitations and to make regulations respecting application of provisions of this chapter* * * *." (Emphasis added.)

covered service contracts (22a, 32a, n.2, 63a, 86a, 93a, 129a).[3]

At the same time, in reaction to *Burns* (*NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972)) (97a-98a, 177a, 178a-179a, 180a, 101, 101a), Congress imposed upon successor employers an admittedly (R. 82) "direct" (145a (§ 4.163(b)), "self-executing," obligation (*id.*; 6a, 11a, n.9, 12a, 33a, n.3, 34a, 36a-37a, 129a, 131a, 145a), to pay no less wages and fringe benefits than their predecessors had paid.[4] Although this obligation is admittedly independent of any wage determination (§ 4.163(b)),[5] it is also admittedly "mandatory" for DOL to incorporate this obligation in all wage determinations issued to successors. (F.D. C.A. Br., p. 6).

Subsection (b) of § 4.163 (145a, 121a), insofar as here pertinent, reads as follows:

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[3] "In no event may a contract on which more than 5 service employees are contemplated to be employed be employed without an appropriate wage determination." (29 CFR § 4.4(f) 44 F.R. 77040, 122a).

[4] 3(c), 41 U.S.C.A. § 353(c) (50a, 4a, n.4), in presently relevant part, reads as follows:

> "No contractor or subcontractor under a [service] contract, which succeeds a [service] contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, * * * to which such service employees would have been entitled if they were employed under the predecessor [service] contract. * * *."

[5] Regulations which reflect DOL's "longstanding policies, rulings and interpretations" (*Clark* v. *Unified Services, Inc.*, 659 F.2d 49, 52 (5 Cir., 1981); (119a, 139a) declare (§ 4.163(a) (131a), January 16, 1981, 29 CFR (rev'd to July 1, 1981) 772 (121a, 131a, 145a)), that under Section 4(c) of the Act:

> "the successor contractor's *sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled* if employed under the predecessor's collective bargaining agreement (sic) (*i.e.*, irrespective of whether the successor's employees were or were not employed by the predecessor contractor)." (Emphasis added.)

"(b) *Section 4(c) is self executing.* Under section 4(c), a successor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which the predecessor contractor paid * * *. *This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of wage determination based on the predecessor contractor's collective bargaining agreement.*" (Emphasis added.)[6]

B. TWAS' Successorship to the ESI and BSI Contracts

The following undisputed background facts were found by the Court of Appeals (2a-3a):

"TWAS [TWA Services] has operated the VIC [Visitor Information Center] at the Kennedy Space Center since 1968 under a Concession Agreement with NASA, under the terms of which TWAS provides bus tours to visitors to the VIC, sells souvenirs, and maintains a cafeteria which caters to VIC visitors. In November 1978 the Concession Agreement was modified (Modification 9 to NAS 10-5755) by which TWAS agreed beginning November 8, 1978, to perform the landscaping function at the VIC which had previously been performed by Expedient Services, Inc. (ESI) pursuant to a basewide contract under which ESI performed all the roads and ground maintenance work at the Center. ESI was a non-union company, its employees were not covered by a collective bargaining agreement. Likewise, TWAS assumed responsibility for facility maintenance at the VIC on January 1, 1979, which, prior to Modification 9, had been performed by Boeing Services International (BSI) whose contract with NASA required it to perform maintenance at all other center facilities. The employees of BSI who performed these functions were represented by the plaintiff union and were covered by a collective bargaining agreement. The contracts between BSI and

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[6] Section 4.163 was omitted for the first time in the revised version of the Regulations published July 1, 1983 (48 F.R. 49761-49762), effective date, January 27, 1984 (156a).

ESI and NASA were treated as covered by the Service Contract Act."

C. The DOL-NASA Conflict Over Coverage

Also undisputed are the Court of Appeals' following findings (3a-4a):

> "From the time that TWAS was first awarded the VIC concession in 1968, NASA took the position that the concessionaire agreement was exempt from the SCA by virtue of the statute and 29 C.F.R. § 4.133, a Department of Labor regulation exempting from the coverage of the Act concessionaire agreements at national parks. [footnote omitted].
>
> * * * *
>
> "Beginning in 1973 there was an exchange of letters between the Department of Labor and NASA, the former asserting that the Concessionaire Agreement was subject to the SCA, and the latter responding that it was exempt from SCA. At the time of Modification 9, when the scope of the work was modified to include landscaping and facility maintenance at the VIC, the coverage issue was raised again but the Department of Labor took no step to compel NASA to require compliance by TWAS with § 353(c)."[7]

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[7] The version of § 4.133(b) quoted by the court below is that promulgated July 10, 1968 (118a-119a). Subsequent versions of § 4.133(a) (137a-138a, 144a, 152a-153a, 155a, 160a), attribute exclusion to the Udall-O'Hara colloquy of May 25, 1966, quoted in relevant part by Judge Young (21a). The December 28, 1979, version states that because of the colloquy DOL "does not require the application of the Act to such contracts." (130a). The December 12, 1980, revision, attributes exclusion solely to the Secretary's asserted discretion. (134a-135a). In the regulations published January 21, 1981, effective date postponed until February 18, 1981, 46 F.R. 5876-5877, the DOL confessed error, admitting that the colloquy does not "constitute part of the statute's legislative history." (150a-153a). Still, the only rationale advanced for exclusion pursuant to the Secretary's asserted "discretion" was the O'Hara-Udall colloquy. *Ibid.*

The December 12, 1980, version expands exclusion from National Park concessionaires to all concessionaires. (134a-138a-138a). The

TWAS was admittedly aware of the unresolved coverage controversy between NASA and DOL, and of the Union's insistence that the VIC contract was covered. 26-27, 4a. On December 6, 1978, Mrs. Come, the DOL Assistant Administrator, wrote NASA protesting that "neither the original contract nor the contract modification contain [SCA] stipulations and applicable wage determinations," and demanding that NASA "see that the appropriate corrective action is taken immediately * * * so that the affected employees may receive the benefits to which they are entitled by law." [8] In reply, NASA reiterated its "disagreement with the DOL position," [9] again asserted that the SCA does not apply,[10] and stated that NASA "did not intend to submit SF 98 [request for wage determination] to the DOL for [the VIC] concession contract competition." [11]

Admittedly, TWAS was simply told, "at the time of Mod nine [before November 8, 1978] * * * by our client NASA, that SCA will not apply to VIC".[12] TWAS was satisfied to act upon this *ipse dixit* despite the fact that DOL regulations proclaimed that, as between DOL and

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version of August 14, 1981, published three months before Judge Young's opinion, proposed explicitly, as a matter of asserted discretion, to exempt "visitor information services." (154a-155a).

The version published July 1, 1983, effective date January 27, 1984 (156a) implies that the O'Hara-Udall colloquy itself exempts "indirect benefit" concession contracts from coverage. (160a). This flouts both Judge Young's holding and DOL's earlier confession of error.

Contrary to the disavowal of knowledge by the court below (14a, n.10), the various regulations through August 14, 1981, were all in the record before Judge Young, and, in any event, were subject to judicial notice, which the court below, indeed, purported to take. (13a).

[8] *Id.*, Fed. D's Response to P's Request for Admissions, filed Feb. 27, 1981, No. 6.

[9] *Id.*, No. 7, p. 1.

[10] *Id.*, p. 2.

[11] *Id.*, p. 3.

[12] *Id.*, p. 6.

contracting agencies, "The Department of Labor (and not the contracting agencies) has the primary and final authority and responsibility of administering and interpreting the Act, including making determinations of coverage." (128a, 125a, 29 C.F.R. § 401(b), 44 F.R. 77049, 142a-143a, § 4.101(b)(c)). Published DOL policy also provided that in cases of any "question" or "doubt" as to coverage, or any "disagreement" by employees with any agency and contractor position, *the contracting agency "shall* submit such question [to DOL] for determination." (122a, § 4.4; 125a, § 4.6(b) 2 (iii), 142a-143a, § 4.101(b)(c)) (emphasis added.). At no time did NASA make such a submission (114a, § 4.4).

Before the recognition agreement was executed, extending IAM's unit to "Mod 9" jobs, a TWAS official accompanied an IAM official to Washington in an effort to obtain a wage determination for the VIC concession contract (14a). Although the Assistant Wage and Hour Administrator adhered to the DOL position that the VIC contract was covered, for reasons the federal respondents did not reveal, Mrs. Come was unable to assure them that the Secretary would issue a wage determination.

At no time did TWAS even attempt to obtain from the Administrator or from the Secretary a non-coverage opinion, or an opinion on coverage in writing, although it had long been the established rule that only a "written ruling of the Secretary of Labor can be relied upon as a defense against liability for wages which must be paid under the Davis-Bacon Act or under [SCA], * * * which do[] not provide any 'good faith' exception."[13] The only "official interpretations and rulings"[14] as to cover-

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[13] Cases cited at 29 CFR § 187(e)(5), 149a, particularly, *Fry Bros.*, Wage Appeals Board, Case No. 76-6, June 14, 1977, pp. 18-19; *James D. West*, Decision of the ALJ, SCA-397-398, Nov. 17, 1975 (neither officially reported). "[I]naction of the Labor Department is no defense." *West, supra*, p. 7.

[14] Secretary's Order No. 16-75, Nov. 21, 1975, 40 FR 55913; Employment Standards Order No. 2-76, Feb. 23, 1976, 41 F.R. 9016).

age of the NASA-TWAS-VIC contract were those issued by Mrs. Come to NASA, asserting coverage.

D. Labor Department Regulations Provide for Retroactivity to the Date of Successorship Where a Wage Determination Is Not Issued Because of an Erroneous Determination That the Act Does Not Apply

DOL Proposed Rules which "reflect longstanding policies, rulings and interpretations" (29 CFR § 4.4(a) (199a, Rules of December 28, 1979, 134a, Rules of January 16, 1981)), provide that where an agency erroneously exempts a covered contract (119a-120a, § 4.5(c)(2), 124a, § 4.5(c)(2)), *retroactive* relief, *i.e.*, back pay, must be provided as a matter of law to make employees whole.[15]

DOL explained the retroactivity requirement as follows (29 CFR 4323, 46 F.R. 4323 (Jan. 16, 1981), "Supplementary Information," § 4.5(c)(2), 139a (see also, 112a-113a, 115a-116a):

> "The listed court cases [providing for retroactivity] are generally cases *in which the courts have required incorporation of contract provisions required by law or considered such provisions to be incorporated as a matter of law.* The Department of Labor does not have the authority to require an agency to reimburse a contractor for additional costs resulting from the inclusion of a wage determination or for other related procurement costs.[16] *These are matters for resolution within the context of the applicable procurement statutes and regulations and GAO directives.* This section of the regulations sets out various possible alternative avenues of relief for the contracting agencies to consider and/or adopt *so as to*

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[15] 122a-124a, § 4.4(g), 125a, 126a, § 4.6(b) 2 (v) (vii), Rules of Dec. 28, 1979; 125a, 126a, 139a-140a, Rules of Dec. 12, 1980, § 4.5(c)(2), 46 F.R. 4341.

[16] This self-serving disclaimer, of course, does not address the right of the contractor to bring suit to compel the federal contracting agency which misled him, in this case NASA, or DOL, to reimburse him, see p. 22, n.39, *infra*, and accompanying text.

provide for equity to contractors while at the same time properly effectuating the remedial purposes of the SCA." (Emphasis added.)

The Regulations explicitly provide that where DOL discovers after a contract has been awarded that a wage determination has been omitted as a result of an *erroneous* coverage determination, DOL "shall" issue a "final" wage determination which shall be "retroactive to the date [the] employees commenced contract work." (125a-126a) (§ 4.6(b)(vii); 132a-133a (§ 4.163(e)). Further, the regulations explicitly define as "*a violation of the Act and the contract*" failure to pay "compensation * * * *retroactive to the date such * * * employees commenced contract work.*" Section 4.6(b)(2)(v) and (vii) (125a-126a, 140a-141a, 147a, § 4.163(j) & (k), 158a-159a, § 4.6(2) & (d)(2) (emphasis added.)).[17] This is so even "in the absence of a minimum wage attachment [to the successor's] contract." § 4.6(2)(3)(d)(2), 126a, 139a, 147a, § 4.163(k). The regulations characterize the right conferred by § 353(c) as "a private right." (148a, § 4.187(b)(2)(d)).[18]

E. Plaintiff's Acceptance of Subminimum Wage Rates Under Protest

During negotiations in the fall of 1978 for the newly added employees, the Union protested to TWAS "that we couldn't accept [the] rates [TWAS offered] because they were lower than the BSI rates and Expedient Serv-

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[17] The regulations further explain that non-complying contracting agencies cannot assert a prior reprocurement claim to retroactive unpaid wages, because to allow this would be "inequitable and contrary to public policy," inasmuch as the employees have performed work from which the Government has received the benefit and to allow recoupment "would be to require employees to pay for the breach of contract between the employer and the agency." (147a-148a, § 4.187(b)(2)).

[18] The regulations also acknowledge that DOL determinations of non-coverage and other legal matters are subject to judicial review. (§ 4.101(b)(c); 128a-129a).

ices rates and [were] against the law." [19] TWAS replied that the issue of SCA coverage *vel non* "wasn't a question of negotiation," but one to be resolved by the courts.[20]

As the court below found, "it is undisputed that [from the time TWAS became a successor] TWAS paid their employees less than the [ESI and BSI] wage determinations." (32a, n. 2; 5a, Tr. Sept. 1, 1982, pp. 46-47, 59). If SCA applied, plaintiff's constituents "would have received from TWAS [footnote omitted] *at least* those wages and fringe benefits contained in wage determinations issued in 1978 for those ESI and BSI employees." (32a, 5a).

On August 24, 1979, NASA and TWAS executed a new ten year VIC concession agreement (NAS-9675), including the services covered by Mod. 9.[21] In October, 1980, IAM and TWAS negotiated a new collective bargaining agreement.[22] Again the Union requested that TWAS raise the wages and fringe benefits of groundskeepers, gardeners and maintenance technicians to SCA standards.[23] TWAS refused on the ground that "the matter was being litigated and it was in the hands of the court and wasn't part of this bargaining." [24]

DECISIONS AND DEVELOPMENTS BELOW

A. Judge's Young's Decision

On November 17, 1981, Judge Young issued a Memorandum Opinion holding that SCA "does not explicitly, or implicitly, exclude concession contracts from its coverage" (21a-23a) and that Congressman O'Hara's "isolated,"

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[19] Kendrick Dep. dated Aug. 10, 1982, pp. 26-27; Tr. Aug. 31, 1982, pp. 6-7.

[20] *Id.*, Chambers dep., pp. 30, 31-33.

[21] A. 56, 74-75, 82, pars. 28-31, Exh. 3 to aff. of Dillon, filed June 19, 1980.

[22] A. 67, par. 62, App. 3.

[23] Kendrick Aff. dated Sept. 14, 1981, pars. 3-4; Kendrick Dep. pp. 17, 19-20, 23-24; Wright Dep. dated Aug. 10, 1982, pp. 12-13; Trammel Dep. dated Aug. 10, 1982, p. 5.

[24] Wright Dep. pp. 13, 15.

two-year-after-enactment "comment, cannot change the effect of the plain language of the statute itself." (R. 23a). However, Judge Young declined to pass upon the squarely presented and specifically litigated question of the existence of discretionary authority in the Secretary to grant exemptions from the wage determination provisions of SCA. He assumed that the amended statute left the Secretary such authority: "The Secretary's *authority to grant exemptions* from the coverage of SCA is conditioned upon certain procedural and substantive safeguards" [25] (25a). (Emphasis added.) He found 29 CFR § 4.133 no defense only because he deemed that section inapplicable to the VIC concession contract (25a-26a). He predicated inapplicability on the fact that that Section does not mention the VIC contract and the Secretary had not satisfied "the procedural and substantive safeguards required" (*id.* 45). Claiming thus to have circumvented the issue of Secretarial exemption power, the court declined "to consider further plaintiff's request to declare § 4.133 null, void and of no force and effect" (*id.*).

B. DOL's Prospective Wage Determination, Dating From Judge Young's Decision

On August 5, 1982, NASA submitted to DOL a request for a *prospective* wage determination (SF 98), applicable *only* to Concession Agreement NAS 10-9675, incorporating the wages and fringe benefits paid by TWAS on November 17, 1981 (the date of Judge Young's decision), pursuant to TWAS' current collective bargaining agreement with the IAM.[26] These rates were substantially lower than those paid by ESI and BSI on the successorship date (p. 10, *supra*), and even lower than

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[25] This assumption appears to have been predicated upon treatment of 41 U.S.C. §§ 38 and 39 (25a), which were not amended, as unaffected by the amendment of § 353(b), with its specific parenthetical exclusion of Section 10 from the Secretary's exemption power (23a).

[26] Court Exh. 2, filed September 1, 1982, Tr. Aug. 30, 1982, pp. 5, 31, 76.

those paid by ESI and BSI on November 17, 1981 (5a, 30a-31a). On August 13, 1982, DOL issued the prospective wage determination NASA had asked for (5a, 30a).[27] It states:

> "* * * the wage rates and fringe benefits set forth in this wage determination are based on a [current] collective bargaining agreement *under which the incumbent contractor is operating.*" (Emphasis added.)[28]

At oral argument in the district court on September 1, 1982, counsel for the Government admitted that denial of retroactivity means that (Tr. 80):

> *"we take the beginning date [of SCA coverage] as the date of the Judge's Memorandum opinion,* * * *.* (Emphasis added.)

The effect of this is not only to deprive covered employees of earned but unpaid wages for work performed from the beginning of the successorship, but to deprive them of *all* of the benefits of § 353(c) in the future, because their wages will never be fixed at those paid by the predecessor at the time of the successorship, see n. 29, *supra.*

C. Judge Kovachevich's Decision

In disagreement with Judge Young, Judge Kovachevich recognized that "in 1972 Congress removed from the

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[27] NASA Director of Industrial Relations King testified that no SF 98 was submitted to cover Modification 9 or NAS 10-5755 because "[i]t was our understanding that the Judge's order * * * [applied only to] the current concession agreement." (Dep. 8/16/82, pp. 24, 25, 31, Dep. 8/30/82, pp. 6-7). King testified on deposition that he chose to make the SF 98 applicable as of November 17, 1981, because he read Judge Young's order as prospective only (*id.* pp. 27-29). King asserted: "its not normal that you make something applicable to a contract until its determined covered" (*id.* p. 36).

[28] Counsel for defendant TWAS explained (*id.*, Tr. 47):

> "In 1979 the concession contract that TWA held was recompeted. Again, there was no wage determination, but if one had been run, it would not have made any difference in the ultimate outcome of the competition or in the wages the employees received, because it would simply have picked up *the collective bargaining agreement rate then in existence between TWA and IAM.* TWA was the incumbent." (Emphasis added.)

Secretary of Labor *any* discretion in issuing wage determinations for contracts subject to SCA, 41 U.S.C. § 358" (R. 33a, emphasis added).[29] However she also found that (31a) "[i]t is undisputed that the Secretary of Labor and NASA have always maintained that the SCA did not apply to the Concession Agreement." This clearly erroneous finding was overturned by the Court of Appeals. (4a).

This misconception appears to have been critical in Judge Kovachevich's reasoning. (33a-34a, n. 3, 37a). Thus, she held, even if a private right of action exists to enforce Section 353(c) in the case of a "clearly covered contract," there is no violation of that Section where NASA and the Secretary of Labor determine, albeit erroneously, that the contract is not covered (34a).

Judge Kovachevich characterized non-issuance of a wage determination to TWAS simply as "error," an "erroneous legal conclusion" (33a, 34a), instead of as inaction unauthorized by statute and therefore *ultra vires*. While admitting that back pay is necessary to make TWAS' employees whole (31a), the court nevertheless denied this relief (R. 34a, 36a), on the ground that the Secretary does not have "a clear and undisputed duty to compel TWAS to pay for his [the Secretary's] mistake" (R. 36a) and that "the equities in this case [do not] favor issuance of a mandatory injunction com-

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[29] Nevertheless, the court refused, without opinion, to reconsider the Union's motion to pass upon and declare § 4.133(b) invalid. (28a). The court also declined to pass on the Union's challenge to DOL's construction of Section 353(c) as applicable only to predecessors who had collective bargaining agreements, and to exclude predecessors who did not. (32a, n. 2). Declination was predicated upon "the Court's disposition of this case" and the fact that if ESI wages and fringes had not declined in the interim, the ESI wage determination as of November 1978 would have been used "as a minimum" in any new wage determination. But, if § 353(c) covers non-union predecessors, it requires incorporation in the TWAS pre-contract wage determination of ESI's wages and fringes as of November, 1978, thereby guaranteeing against any subsequent decline.

pelling issuance of retroactive wage determinations." (34a).[30]

D. The Opinion Below

On May 3, 1984, the court below affirmed, holding that absent a pre-contract wage determination, TWAS could not have violated § 353(c) (8a-10a) and that § 353 (c) creates no private right of action against TWAS (6a), and no right to mandamus against the federal agencies. (11a-14a). There is no "clear, ministerial * * * duty" under "the statutory or regulatory language" for DOL and NASA to "retroactively modify the fully completed (sic) Concession Agreements." (13a).

Unlike the district court, which simply ignored the legislative history, the court below misconstrued it and misstated our contention (6a):

> "Plaintiff lays *great stress* upon the *undisputed fact* that the 1972 amendment adding subsection (c) of § 353 was prompted by Congress' dissatisfaction with the Secretary's *inconsistent* administration of the Act in granting exemptions from coverage." (Emphasis added.)

Petitioner *never* advanced any such theory (See C.A. Br. for Appellant, pp. 9-12). Nor is it a "fact," much less an "undisputed fact", that the Secretary's administration was found by Congress to be "inconsistent." The legislative history shows, without possible dispute, p. 2, n.1, *supra*, that "Congress' dissatisfaction" was "prompted" *not* by "inconsistent" administration, but by

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[30] On December 1, 1982, after petitioner had appealed from the final judgment (44a, 227a, 228a), the district court, although then without jurisdiction, denied motions of petitioner and TWAS to defer application for fees and expenses pending appeal and arbitrarily ordered the parties to file such applications instanter (40a, 228a). Upon their failure to comply, the court, on February 3, 1983, ordered that "any claim for attorneys fees is denied." (46a-50a). If certiorari is granted and the judgment reversed, this Court should vacate the order of February 3, 1983, to prevent that order from standing as an obstacle to unfettered exercise of this Court's jurisdiction.

all-too-consistent nonfeasance, malfeasance and misfeasance, which *consistently* flounted and frustrated Congress' policy and purpose at the expense of Congress' objectives.[31] *Id.*, 77a, 180a-182a, 185a, 188a, 190a. Nothing in the legislative history warrants finding that "the purpose of the amendments was merely to *restrict* [or "narrow"] the Secretary of Labor's discretion * * *" (7a).

The court below affirmed *sub silentio* Judge Kovachevich's refusal to pass on the Secretary's alleged misinterpretation of Section 353(c) (*supra*, pp. 12-13). It also refused to address the validity of § 4.133, on the theory that Judge Young's declination to pass upon that issue had "removed the regulation from further consideration" (14a, n. 10). The court asserted that the "Secretary's *proposed amendment* to the regulation (which so far as we know was not before the district court) * * * may never be adopted * * *." But the record shows that the proposed regulations from 1967 through 1981, *were* brought to the attention of the district court.[32]

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[31] The court below attributed its conception to the Senate Report which assertedly characterized Congress' objective as a "more efficient *administration*" of the SCA. (7a). But the Senate Report proposed to accomplish this by imposing various mandatory duties on the Secretary and service contractors. (77a (1), (5), 82a-83a). And the House Report, No. 92-1251, 61a-63a, explains that the amendments are designed "to bring about more equitable and more efficient administration of the Act and *to provide for wage and fringe benefits determinations for all contracts* * * *." (Emphasis added) (67a). The Report explains that "the Committee * * * believes that these amendments will help to strengthen the Department of Labor's ability to administer the Act as the sponsors of the Service Contract Act originally intended."

The debates (89a, 91a, 92a, 108a) show that what the Committee meant was that the amendments would enable DOL to resist contracting agency demands for exemptions. (62a). The legislative history is silent as to what would happen if DOL continued to capitulate.

[32] TWAS' Supplemental Memo in Support of its Motion for Summary Judgment, filed 9/9/81, pp. 1-2; Plaintiff's Reply to TWAS' Supplemental Memo in Support of its Motion for Summary Judgment, filed 9/15/18, p. 1.

And the proposed amendment of August 14, 1981 (154a), 46 F.R. 41382, 41405, which explicitly exempts visitor information services (155a), was published three months before Judge Young issued his decision.[33]

REASONS FOR GRANTING THE WRIT

I. THE OPINIONS AND JUDGMENTS BELOW SO DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION

This case is certworthy for the following reasons:

1. The decision below nullifies the 1972 amendments by depriving the employee beneficiaries of both the right and any remedy to enforce the mandatory duties they impose upon DOL, federal contracting agencies and service contractors. Congress imposed those mandatory duties "to reassert its policymaking primacy over the bureaucracy" (107a), which experience had taught would "overlook no opportunity to render the Act nugatory." 108a. The Administration opposed the 1972 amendments. (95a, 96a, 107a-109a, 116a).

DOL proceeded to flout the amendments by asserting power to grant exemptions from coverage, which the amendments "specifically withheld" (*Leedom* v. *Kyne*, 358 U.S. 184, 189 (1958)), and by illegally exempting covered concession contracts.[34] On July 1, 1982, a House Com-

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[33] The version published July 1, 1983, effective January 27, 1984, almost a year after Judge Kovachevich's opinion, reverted to the original ambiguous version published in 1978. (160a). See n.7, pp. 5-6, *supra*.

[34] In response to petitioner's suit, DOL and NASA defended their *ultra vires* denial of coverage on frivolous grounds: treatment of the post-enactment Udall-O'Hara colloquy as if it were legislative history and baseless assertion of power in the Secretary to grant discretionary exemptions from coverage.

The only explanation offered by DOL for its contention that under amended § 353(b) the Secretary retains exemption power (30a) is that the Secretary's power is "similar" to that vested in

mittee reported that the Proposed Regulations whereby DOL purported to justify its actions "are an attempt to redraft the Service Contract Act by administrative action. It is simply an attempt to usurp the powers of Congress * * *." (182a-183a).

> "[T]he courts * * * must reject administrative constructions of the statute, * * * that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

As Justice Rehnquist put it in his concurring and dissenting opinion in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance*, —— U.S. ——, 51 L.W. 4953, 4961 * (June 24, 1983):

> * "a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions."

Where lower courts allow administrative agencies to get away with this, this Court has no higher obligation than to grant certiorari to vindicate the separation of powers and restore Congress' policy to ascendancy.[35]

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him under Section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331). (135a-136a). "Similar" should read "dissimilar," inasmuch as neither of those Acts contains a specific divestiture of power to exempt from coverage for wage determination purposes, as does 353(b), as amended.

NASA's alternative reliance upon the 1973 amendment to the National Aeronautics and Space Act (mentioned by the court below) (3a-4a), was not even referred to by Judges Young and Kovachevich for the obvious reason that "authorization to provide facilities for visitors to NASA centers" is irrelevant to the question of SCA coverage of those facilities.

NASA and DOL did not appeal from Judge Young's decision; TWAS withdrew its appeal.

[35] *G.L. Christian & Associates* v. *United States*, 320 F.2d 345, 351, 160 Ct. Cl. 58, 63, cert. denied, 375 U.S. 954 (1963), cited with approval in *Universities Research Assn.* v. *Coutu*, 450 U.S. 754, 783, 784, n. 38 (1981), explained:

This case is, therefore, of constitutional dimension. It is a paradigm of brazen, wholesale, administrative usurpation of legislative power in effect to repeal an Act of Congress which both the current and the past Administration dislike. (95a, 96a, 98a, 107a-109a). Review by this Court is indispensable to revive the 1972 amendments.

Nullification of the 1972 amendments is of immense practical significance. By excluding from coverage concession contracts for services from which the Government benefits "indirectly," and by limiting § 353(c) to predecessors with collective bargaining contracts, the Secretary may have deprived as many as three quarters, ¾, of the estimated 1,000,000 SCA covered employees, of benefits under the Act.[36]

2. The decisions below disregard DOL's totally unexplained violation of its own Rules, which dictate precisely the opposite result in this case, pp. 6-7, 8-9, *supra*. They thereby flout the firmly established law of this Court. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265, n. 7 (1954). These rules are "the standards of agency action which the APA directs the courts to enforce." *United States* v. *Caceres*, 440 U.S. 741, 754 (1979).

"It [is] important * * * that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials, or by a concert of contractor and contracting officer. * * * *Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against ad hoc encroachment or dispensation by the executive* * * *". (Emphasis added.)

[36] According to the findings of the Congressional Oversight Committee, there are "one million service contract vendors fulfilling 25 thousand service contracts" (106a). Almost two thirds of these contracts subject to the Act were not covered by wage determinations (108a, 63a). The Department of Labor disclaims any knowledge of the number of employees it has excluded under § 4.133. (192a-193a). Widespread public interest was shown in DOL's proposal to amend the proposed Rules of December 28, 1979 (46 F.R. 4320).

The sequence of events recited in the Statement makes it apparent that DOL was coerced by NASA and the Administration, not only to violate the statute, but even to violate its own Rules wholesale; first by abandoning its jealously guarded authority as initial administrative adjudicator of coverage (pp. 6-7, *supra*); second, by declining to issue a pre-contract wage determination, although DOL had determined and insisted from the inception that VIC was covered (pp. 5-8, *supra*); third, by allowing the Department of Justice to misrepresent its litigation position as anti-coverage (19a-20a), when its position was actually the reverse (pp. 5-8, *supra*); and fourth, by issuing a "prospective only" wage determination after it had been judicially established that non-issuance of a pre-contract wage determination was "error," and its own policy required issuance of a wage determination embodying the predecessors' standards retroactive to the date of successorship (pp. 8-9, *supra*). There is no record basis for the speculation of the court below that "the wage determinations were not made because of NASA's view that the contract was not subject to the Act." (13a).

3. The decision below is in square conflict with the "incorporation by operation of law" rule, approved in *Coutu*, *supra*, 450 U.S. at 783-784, n. 38, which is applicable here precisely because § 353 is "self-executing", *i.e.*, "self implementing." *Coutu* distinguishes between self-implementing obligations, which are incorporated in federal service contracts from their inception by operation of law, and obligations dependent upon issuance of discretionary wage determinations, which are not so incorporated. Applying that distinction, *Coutu* held that no "private right of action" exists "for back wages under a contract that administratively has been determined not to call for Davis-Bacon work." [37]

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[37] The rationale is that because Davis-Bacon is phrased as "a directive to federal agencies engaged in the disbursement of public funds;" and requires administrative definition and application to particular work of various "difficult" and "complex" statutory terms

On the other hand, the mandatory language of § 353 (c) "explicitly confer[s] a right directly on a class of persons [employees of successor contractors] that include[s] the plaintiff in this case" (450 U.S. at 772). Therefore, that right, and the correlative obligation of successor contractors, are incorporated in SCA contracts by operation of law and *do* create private rights of action judicially enforceable by the direct beneficiaries against the contractors. *G.L. Christian, supra*, 160 Ct. Cl. 1, 11-17, 312 F.2d 418, 427, reargument denied, 100 Ct. Cl. 58, 60-67, 320 F.2d 345, 347-354, cert. denied, 375 U.S. 954 (1963), cited with approval in *Coutu*, 450 U.S. at 784, n. 38, proves that.

In its Brief for the United States as Amicus Curiae in *Coutu*, No. 78-1945, filed February 12, 1980, p. 17, n. 13, the Government admitted that only a *valid* exercise of administrative discretion can avoid the "incorporation by operation of law" rule, even under the Davis-Bacon Act. Thus, the Government said, *Coutu* "is not a case in which the Davis-Bacon Act provisions were inadvertently omitted from a contract or in which the contracting agency concedes that *the omission was erroneous*." (Emphasis added.) The clear implication is that if *Coutu* had been such a case, the beneficiaries would have a private cause of action. It follows that where, as here, omission of the pre-contract wage determination was admittedly "erroneous," petitioner, contrary to the court below (13a), has a private right of action to enforce TWAS' liability for back pay, as well as a cause of action in mandamus against the federal agencies for *ultra vires* inaction.

4. The decision below conflicts in principle with decisions of this Court on important questions of law including retroactivity, implied rights of action, mandamus, equitable discretion, the scope of § 301 of LMRA and

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(450 U.S. at 784), "the Act is not self implementing." *Id.* n. 38. Moreover, specific legislative history (450 U.S. at 775-780, 782) precluded courts from making "postcontract coverage rulings" (450 U.S. at 783).

ripeness for adjudication. Wholesale rejection of this Court's precedents, often apparent on the face of the opinions below themselves, is so inconsistent with the normal course of adjudication as to call for exercise of this Court's power of supervision. We briefly discuss each of these conflicts below.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT CONFLICTS WITH DECISIONS OF THIS COURT

A. Effect on Retroactivity of *Ultra Vires* Administrative Denials of Coverage

The holdings below that where a pre-contract wage determination is erroneously omitted, coverage does not attach until a court finds the contract covered, is not only absolutely unprecedented, it is in square conflict with *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618-620 (1944). *Addison* holds that breach of a mandatory obligation "because the Administrator misconceived the bounds of his regulatory powers," does not result in tolling of the statute, but in a mandamusable duty to rectify the error, and thereby restore the situation as closely as possible to what it would have been had the Administrator not erred. *Addison* holds that relief "retroactive" to the date of the Secretary's mistake is indispensable to avoid "postpon[ing] the operation of the Act" and to prevent the "mischief of producing a result contrary to the statutory design." (*Id.* at 620). As shown above, pp. 10, 12, *supra*, the effect of rejection of *Addison* by the court below is not only to postpone coverage for years, but to deprive erroneously excluded employees entirely of the benefits of § 353(c), thereby accomplishing, as to them, total repeal.

The courts below assumed that because NASA and DOL are charged with the duty of applying SCA to all covered contracts, it is within the scope of their authority erroneously to determine that covered contracts are not covered. But a Secretarial non-coverage determination is "*ultra vires*," as *Addison*, *supra*, 322 U.S. at 619, squarely holds, and, therefore, can neither toll the statute

or entitle any contract bidder to rely thereon. This is patently so, since non-coverage determinations under SCA are admittedly routinely subject to post-contract judicial review (*Clark* v. *Unified Services, Inc., supra,* 659 F.2d at 50, n. 5), whereas if such determinations were not *ultra vires,* there could normally be no post-contract judicial review of non-coverage determinations, as *Coutu* implies. The central premise of the opinions below—TWAS' entitlement to rely on NASA's "erroneous" non-coverage determination—is therefore totally fallacious and in conflict with decisions of this Court.

This misconception, in turn, springs from one even more basic, that TWAS could not be liable unless it had "knowledge of SCA coverage by operation of law" (11a, n. 9, 34a, n. 3, 37a). As Samuel Williston put it in argument in 1913, in *Boston & M.R. Co.* v. *Hooker,* 233 U.S. 97, 58 L.Ed., at 872, "a law or statute is binding whether persons subject to the law are aware of it or not." The principle is applicable *a fortiori* where, as under § 353(c), the statute does not condition liability on "wilfulness" or absence of "good faith," p. 7, *supra.* The contrary holding below is in square conflict with *Laffey* v. *Northwest Airlines, Inc.,* 567 F.2d 429, 459-466 (D.C. Cir., 1976), cert. denied, 434 U.S. 1086 (1978).

Intrinsically, the courts below erred because they asked the wrong question: the question is not whether DOL is required to reimburse, or to compel NASA to reimburse, TWAS for the agencies' mistake, but whether the court must compel a retroactive wage determination to issue and be enforced against TWAS in order to make employees whole for their legally earned but unpaid wages. As DOL's interpretation of the law itself recognizes (pp. 8-9, *supra*), DOL and NASA must compel the contractor to pay, "both *retroactively* and in the future, the new higher [SCA wage determinations based on § 353(c)] which were issued by the Secretary of Labor during project performance, the Secretary having admitted that his original determination was *erroneous*

* * *." (Emphasis added.) *Morrison-Hardeman-Perini-Leavell* v. *United States*, 392 F.2d 988, 997, 183 Ct. Cl. 938 (1968).

Whether TWAS can recover by demand or suit against DOL or NASA, or both, the additional expenses it would have paid, but did not, because of their coverage "mistake" is, as DOL itself recognizes (pp. 8-9, *supra*), an unrelated question reserved to an entirely different forum, the Court of Claims.[38] By recasting the issue from the necessary remedy for NASA and DOL's concededly erroneous non-performance of their mandatory duty—the requirement that they compel TWAS to make the employees whole—into search for an unclaimed obligation on the part of DOL to compel NASA to make *the successor contractor* whole, the courts below introduced a red herring which effectively emasculates their duty to provide full and effective relief for the violation found. Cases cited, p. 26, n.42, *infra*.

B. Implied Private Cause of Action Against Successors

While purporting to accept DOL's self-evident interpretation of § 353(c) as "self-executing," the court below actually rejected it, relying upon dictum in *International Ass'n of Mach. & Aerospace Wkrs.* v. *Hodgson*, 515 F.2d 373, 378-379 (D.C. Cir., 1975) (8a-9a)[39] and *Miscellaneous Service Workers, Local 427* v. *Philco-Ford Corp.*, 661 F.2d 776 (9 Cir., 1981) (7a-8a), which followed it. On the *Hodgson* theory, because there was no

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[38] *The Metrig Corporation* v. *United States*, 427 F.2d 778, 780-781 (Ct. Cl., 1970) (contractor assumed the risk that FLSA would be held to apply); *Morrison-Hardeman-Perini-Leavell* v. *United States*, 392 F.2d 988, 997, 183 Ct. Cl. 938 (1968) (allowing recovery "where the government requires the contractor to pay the higher wage amounts").

[39] *Hodgson* preceded *Coutu* by six years. Significantly also, in *Hodgson* the court noted that the Union had disclaimed that its suit was "an attempt to enforce the [SCA] contract with retroactive application of the wage determination." (515 F.2d at 378.) The "incorporation by operation of law" principle was not considered in *Philco-Ford*, either, nor was *Coutu*, decided seven months earlier, even cited.

pre-contract wage determination, TWAS could not have violated the Act, and because Congress did not enact a special judicial remedy provision, the beneficiaries had none. (8a-10a, 32a-34a). According to *Philco-Ford*, Congress evidenced an intention to deny a private cause of action because administrative remedies existed for nonpayment of § 353(c) wages and Congress intended only "to bring about more equitable and more efficient *administration* * * * by *narrowing* the Secretary's discretion." (Emphasis added to "narrowing").

Although neither the *Philco-Ford* court nor the courts below in this case cited *Coutu*, their reasoning is clearly designed to circumvent the "incorporation by operation of law" rule it approves. The holding that TWAS did not violate § 353(c) is totally incompatible with the courts' purported acceptance of DOL's interpretation that § 353(c) is "self executing." Denial of a private right of action is predicated on misreading the legislative history as merely "narrowing", rather than totally obliterating, the Secretary's exemption discretion and misreading the legislative objective as limited to administrative self improvement, p. 2, n. 1, 12, 14-15, *supra*.

Hodgson, *Philco-Ford* and the courts below failed to recognize that §§ 353(c) and 358 are different in kind from any provision of the statute as originally enacted, precisely because they impose "self-implementing," mandatory, duties on DOL, federal contracting agencies, and service contractors. "[T]his Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Cannon* v. *University of Chicago*, 441 U.S. 677, 690, n. 13, 694 (1979).

To be sure, even in such circumstances a private right of action will not be implied if Congress provided an administrative remedy which the statutory language or the legislative history indicate that Congress intended to be exclusive. *Philco-Ford*, 661 F.2d at 781. But nothing in the language or the legislative history of the 1972

amendments indicates that Congress intended the administrative remedies it provided *in 1965*, when SCA contained no "self implementing," mandatory, duties, to be the *exclusive* remedies for the private substantive rights Congress created in 1972. "The creation of one explicit mode of enforcement is not dispositive of Congressional intent with respect to other complementary remedies. See *Cort* v. *Ash*, 422 U.S. 66, 82-83, n. 14 (1975); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 29, n. 6 (1979) (White, J., dissenting)." *California* v. *Sierra Club*, 451 U.S. 287, 295, n. 6 (1981). As stated in *Cannon, supra*, 441 U.S. at 711:

> *"The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.* See, e.g., *J.I. Case Co.* v. *Borak*, 377 U.S. 426; *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191. Rather, the Court has generally avoided this type of "excursion into extrapolation of legislative intent," *Cort* v. *Ash*, 422 U.S. at 83 n.14, unless there is other, more convincing, evidence that Congress meant to exclude the remedy. See *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S., at 458-461." (Emphasis added.)

Not only is there *no* evidence that Congress meant to exclude private actions for enforcement of 353(c), there is positive evidence that Congress intended the "self executing" rights and obligations of § 353(c) to be judicially enforceable by the beneficiaries against successor contractors. In 1972, pre-*Cort* v. *Ash, supra*, Congress was entitled to, and inferentially did, rely on then current legal doctrine which implied judicially enforceable private rights of action for violation of direct, mandatory, private, duties. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378, 379, see also, 374-377 (1982).

To conclude that Congress failed to evidence a purpose of creating a private right of action on behalf of em-

ployees against successor contractors who violate § 353 (c), because it failed to enact another federal question statute and another § 301, applicable only to § 353(c), would mean that "Congress intended to hold out to them an illusory right for which it was denying them a remedy." *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 240 (1949).

C. Mandamus Against the Secretary and NASA

The court below argued from the found absence of a private cause of action against TWAS to the implied non-existence of a duty enforceable by mandamus against DOL and NASA. (13a). But that stands law and logic on their head. Assuming, *arguendo*, and contrary to fact, that Congress barred private actions because it wanted to centralize administration in contracting agencies and DOL, it becomes even more indispensable that mandamus lie for non-performance of those agencies' mandatory duties. Instead of "artful[ly]" circumventing the disability, as the court below saw it (13a), mandamus is essential to avoid the existence of a right without a remedy.[40]

Contrary to the court below, it is just "that simple" (12a). The excuses it offers for denial of mandamus conflict in basic principle with an unbroken tradition of decisions of this Court and courts of appeals.[41]

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[40] "* * * [W]here an individual fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." *Camp* v. *Boyd*, 229 U.S. 530, 559 (1913), quoting *Lytle* v. *Arkansas*, 9 How. 314, 333 (1850).

[41] *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 545 (1937); *Carpet, Linoleum & Resilient Tile Etc.* v. *Brown*, 656 F.2d 564, 566-569 (10 Cir., 1981) (thoughtful opinion, discussing current mandamus scholarship; Secretary of Labor's failure and refusal to perform mandatory enforcement obligations under the Davis Bacon Act "requires a remedy if our increasingly bureaucratic society is to retain at least the resemblance of accountability" (*id.* at 569)); *Labette County Comrs.* v. *United States*, 112 U.S. 217, 223-225 (1884) (mandamus "would not be complete or effective without it embraced all the particulars which, in law, are essential to the full duty contemplated by it, the performance of

To suggest that mandamus is unavailable because Congress failed to enact another mandamus statute as part of the 1972 amendments, would be to conclude that Congress "flouted its own declaration of policy" and would impute to Congress "a breach of faith." *Espinosa* v. *Farah Mfg. Co.*, 414 U.S. 86, 90-91 (1973). To hold that "redress of plaintiff's grievances lay with the Secretary and not in the courts" (*Philco-Ford Corp., supra*, 661 F.2d at 781), is to say that Congress set the fox to guard the chicken coop.

D. The Misconception of Equitable Discretion

by misfocusing the issue (pp. 22-23, *supra*), the courts below were able to substitute their own peculiar notions of "equity" for Congress' "make whole" mandate. They not only deprived the employees of wages to which they were legally entitled by having worked for TWAS, they bestowed those wages on the employer as a windfall. In this respect, the holdings below are in square conflict not only with *Addison, supra*, but with *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414-416 (1975) and DOL's own Rules.

The court below proclaims: "TWAS was not at fault for any failure to comply with the SCA" (13a). But, as a matter of law, it was. TWAS admittedly knew of the dispute between DOL and TWAS over coverage (pp. 5-6, 9-10, *supra*). Examination of DOL's Rules would have established that TWAS was not entitled to rely on NASA's *dictat*. What it needed, was an authoritative,

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which is necessary to secure its benefits to the party who sues it out"); *Kansas City So. R. Co.* v. *Interstate Commerce Commission*, 252 U.S. 178, 187-188 (1920) (mandamus issued to remedy Commission's legal error, even though the error "was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess"); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (a court may not stop short of granting relief which "completely and irrevocably eradicate[s] the effects of the violation").

non-coverage, opinion from DOL in writing, p. 7, *supra*. This it could not, and did not even attempt, to get. As stated in *G. L. Christian*, *supra*, 320 F.2d at 351, "potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make." Here the "published directives" were the crystal clear 1972 amendments, their extensive legislative history, and the DOL interpretations, which should have placed any successor contractor's lawyer on notice that NASA's non-coverage opinion was apt to be in error as a matter of law.

Since TWAS knew, when it entered into the service contracts, that the absence therefrom of wage determination provisions was "of highly questionable legality" (*Albemarle Paper Co.*, *supra*, 422 U.S. at 422), TWAS was *not* in "good faith, * * * and can make no claims whatever on the Chancellor's conscience." (*Id.*) It is not petitioner which can be said to be seeking "to shift the blame to TWAS," but TWAS, NASA and DOL who are seeking to shift the blame for their own wrongdoing to petitioner, who was wholly innocent.

Inferentially acknowledging this, the court below faulted plaintiff for "lethargy" (14a). But, since the VIC contract was not executed until November, 1978, the coverage issue did not become ripe for litigation until that time.[42]

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[42] In any event, the "lethargy" argument is in square conflict with the decision of this Court in *W. R. Grace and Co.* v. *Local Union No. 759, Etc.*, —— U.S. ——, 51 L.W. 4643, 4646, n. 12 (decided May 31, 1983), affirming, 652 F.2d 1248, 1255, 1256 (5 Cir., 1981):

> "there is no rule requiring a party to ask for prospective relief from a possible contractual breach. The Union justifiably relied on its right to backpay damages."

The Fifth Circuit had said (652 F.2d at 1258):

> "The union was not its adversary's keeper. It was pursuing its own lawful remedies in its own way * * *."

E. Enforceability of Plaintiff's § 353(c) Right, Incorporated by Operation of Law in the Successive Collective Bargaining Agreements, Under § 29 U.S.C. § 301

Refusal of the court below to recognize that 29 U.S.C.A. § 301 of the Labor Management Relations Act imports the minimum wage and fringe benefit requirements contained in § 353(c) (10a-11a) into federal collective bargaining contracts, conflicts in principle with *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957) ("the substantive law to apply in suits under § 301(a) is federal law, which courts must fashion from the policy of our national labor laws."). The "incorporation by operation of law" rule is itself federal law. *Coutu, supra*; *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941). It is particularly applicable to federal minimum wage and fringe benefit laws, which thereby supersede lower minimums which parties have written into federal collective bargaining contracts. "[A]n agreement * * * may have a legal effect different from that agreed upon, as in the case of employment at less than a statutory minimum wage." *Restatement of Contracts* (Second, 1973) § 226a.[43]

In *Jackson Transit Authority* v. *Transit Union*, 457 U.S. 15, 22-23 (1982), this Court said:

> "on several occasions the Court has determined that a plaintiff stated a federal claim when he sued to vindicate contractual rights set forth by federal statutes, *despite the fact that the relevant statues lacked express provisions creating federal causes of action* * * *.

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[43] *G.L. Christian & Associates* v. *United States, supra*, 312 F.2d at 424 (if "there was a legal requirement that the * * * contract contain [a particular] clause * * * the contract must be read as if it did") and *G.L. Christian & Associates* v. *United States, supra*, 320 F.2d at 351. Therefore, BSI and ESI wages and fringe benefits as of November, 1978, were, as a matter of law, "read into the agreement [as a floor] whether the negotiators put it there or not." *G.L. Christian & Associates* v. *United States, supra*, 320 F.2d at 351.

> "These decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." (Emphasis added)

Collective bargaining contracts are clearly "contemplated" by SCA. Indeed they are, in part at least, the subject of the 1972 amendments. The holding below ignores *Jackson*, with which it is in irreconcilable conflict.

F. Ripeness

Declination below to pass upon the validity of 29 CFR § 4.133, pp. 11, 12, n. 30, 15, *supra*, is in conflict, *inter alia*, with *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967); *Larsen* v. *Valente*, 456 U.S. 228, 238-244 (1982) (official invocation of a statute or regulation in support of treatment accorded private parties constitutes the " 'fairly traceable' causal connection between the claimed injury and the challenged [regulation]." *Id.* at 239); *Super-Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 121, 125, 127 (1974) (the judiciary must not refuse to resolve important questions of law, sharply contested between adversaries with real stakes in the outcome); *County of Los Angeles* v. *Davis*, *supra*, 440 U.S. at 631 (no mootness unless "it can be said with assurance 'that there is no reasonable expectation' " of recurrence).

The opinions below reverse these rules. They disregard the actual application by DOL of § 4.133(c) to concession contracts in general, as well as specifically to visitor information contracts; treat judicial resolution of the issue of applicability of § 4.133 to the VIC contract as terminating the deeper controversy over validity of § 4.133, and they demand proof "that the alleged violation [application of § 4.133 to VIC] *will* recur," instead of inquiring whether there is *any danger of recurrence*, which, as a matter of fact, happened years before the opinion below issued, p. 6, n. 7, last par., *supra*.

Refusal to pass upon DOL's restrictive interpretation of § 353(c), limiting it to predecessors with collective bargaining agreements, likewise conflicts with the authorities cited above. Abstention was particularly unjustified since the Secretary's interpretation had been rejected by the only courts of appeals which have considered the matter.[44]

The only explanation offered by DOL for its restrictive reading (146a, 29 CFR § 163(d)(1981)) is:

> "The Senate report accompanying the bill which amended the Act in 1972 states that "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme." (S. Rept. 92-1131, 92nd Cong., 2nd Sess. 4). Therefore, since section 4(c) refers only to the predecessor contractor's collective bargaining agreement, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement. * * *"

In the first place, this rationale omits the immediately succeeding sentence of the Senate Report which explains that only *the proviso* refers to collective bargaining agreements, and that Sections 2(a)(1) and 2(a)(2) must likewise be so construed (81a).[45] Secondly, the word "contract" in the text preceding the proviso clearly refers to SCA "contract," *not* to a collective bargaining contract. (146a-147a, 29 CFR § 163(e)). Congress ex-

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[44] *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250, 1253 (D.C. Cir., 1978); *Misc. Service Workers, Etc.* v. *Philco Ford Corp.*, 661 F.2d 776, 779 (9 Cir., 1981) (parsing the statute demonstrates that the reference to collective bargaining agreements pertains only to "prospective increases"). The Committee Reports confirm that this was the understanding and intention of Congress. (66a-67a, H. Rept.; 80a, S. Rept.; 101a (understanding of opposition)).

[45] "It is the intention of the committee that sections 2(a)(1) and 2(a)(2) and 4(c) be so construed that *the proviso* in section 4(c) applies equally to all the above provisions."

plicitly distinguished between the two, referring to collective bargaining contracts as such when it so intended.[46]

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted and the judgment below reversed with instructions to grant all relief requested by petitioner in the supplemental and second amended complaint (194a-206a), including counsel fees and costs, p. 13, n. 31, *supra*.

Respectfully submitted,

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[46] The rationale of the distinction in context is obvious; normally, only collective bargaining contracts provide for "prospective increases in wages and fringe benefits." The Committee Reports and debates show that Congress understood this.